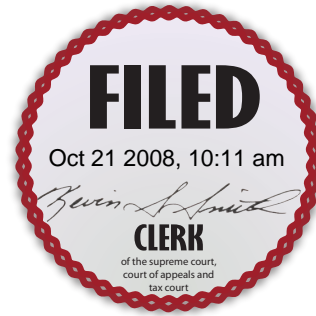


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS FINE,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 82A04-0703-CV-139
)	
ROBERT G. HARP and)	
DELORES C. HARP,)	
)	
Appellees-Defendants.)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause Nos. 82D04-0309-DR-917 and
82D03-0311-DR-5106

October 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

In this consolidated appeal,¹ Thomas Fine appeals the denial of his motion for relief from judgment pursuant to Indiana Trial Rule 60(B), and the trial court's judgment in favor of Robert and Delores Harp (the "Harps").

We affirm in part, dismiss in part, and remand in part.²

¹ This case arises from cause numbers 82D03-0311-DR-5106 ("Cause No. 5106") and 82D04-0309-DR-917 ("Cause No. 917"), which the trial court consolidated for trial. Pursuant to Appellate Rule 38(A), "they shall remain consolidated on appeal" under Cause Number 82A04-0703-CV-00139 ("CV-139").

Fine also has another appeal under Cause Number 82A05-0709-CV-536 ("CV-536"), which arises from Cause No. 917—the dissolution action between Fine and Karen Fine. That appeal is being held in abeyance.

² This case was fully briefed by the parties on November 1, 2007. Certain issues, however, necessitated several show-cause orders, which delayed swift resolution of this appeal.

On December 19, 2007, this Court issued a show-cause order, directing Fine to, *inter alia*, file a status report regarding his bankruptcy filing, which Fine had failed to reveal to this Court. The show-cause order specifically ordered Fine to "state whether this matter is subject to the automatic stay, whether any party has moved to lift the stay, and whether a trustee and/or bankruptcy court have issued any decisions relative to this appeal." (Show-Cause Order, Dec. 19, 2007). The December 19 show-cause order noted, "it is not entirely clear whether the subject matter of the pending appeals in CV-536 and CV-139 are necessarily related." *Id.* Fine filed his response regarding the bankruptcy issue on January 18, 2008.

On March 12, 2008, this Court issued a second show-cause order as Fine's responses did "not adequately address several concerns raised in this Court's show cause order and fail[ed] to demonstrate that [Fine] remains as the real party in interest after the filing of the Chapter 13 Bankruptcy and the appointment of a trustee"; failed to "assuage[] this Court's concerns with regard to piecemeal litigation"; and "raised additional questions regarding this Court's jurisdiction to act in these appeals at this juncture." (Show-Cause Order, Mar. 12, 2008). Specifically, this Court determined that "finality and timeliness questions are unsettled and are implicated in both appeals: CV-139 and CV-536." *Id.* Accordingly, this Court ordered Fine to "file a response stating whether [he] may prosecute this appeal or whether the Trustee should be substituted as the real party in interest in this matter." *Id.* The order further allowed Fine to "respon[d] to this Court's concerns with regard to res judicata, law of the case, timeliness, and finality." *Id.*

Fine filed his response on April 1, 2008, as did the Chapter 13 Trustee in Fine's bankruptcy proceeding. The Chapter 13 Trustee informed this Court that Fine intended to request conversion of his Chapter 13 bankruptcy to a Chapter 7 bankruptcy. As such, this Court ordered Fine to provide a status report regarding his bankruptcy, including "the name and address of the Bankruptcy Trustee if conversion is allowed" and to "update all aspects of the issues set forth in this Court's show cause order issued March 12, 2008." (Show-Cause Order, Apr. 10, 2008). Fine filed a response on May 28, 2008, "indicat[ing] that the conversion has occurred and that Robert P. Musgrave was reappointed as the Chapter 7 Trustee." (Show-Cause Order, June 20, 2008).

ISSUES

1. Whether the trial court abused its discretion in denying Fine's motion for relief from judgment.
2. Whether the trial court erred in determining that certain real property was not a marital asset.

FACTS

This consolidated appeal arises from two separate actions: Cause No. 917—a petition for dissolution, and Cause No. 5106—a judgment in a declaratory action filed by Fine.

1. Cause No. 917

Karen Fine is the Harps' daughter. She and Fine were married on August 31, 1971. Fine filed a petition for dissolution of the marriage on September 4, 2003.

In April of 1964, the Harps purchased residential real estate located at 1220 Royal Avenue, Evansville from Jack and Marguerite Foster. The Fosters conveyed 1220 Royal Avenue to the Harps by way of a warranty deed. The Harps executed a mortgage in the

This Court continued to hold CV-139 in abeyance and ordered Fine to file a status report "as to whether [he] may proceed as the real-party-in-interest" and to "update all aspects of the issues set forth in this Court's previous show cause orders." *Id.* Fine filed his belated and cursory response on June 29, 2008, informing this Court that "the newly appointed Trustee is Laura A. Duvall" and that "[i]t would appear that the Trustee Laura A. Duvall should be the real party in interest" (Fine's Response, July 29, 2008). Fine also provided a copy of the docket from the Chapter 7 bankruptcy proceeding.

A review of this docket, however, revealed that R. Stephen LaPlante is the successor trustee. This Court continued to hold Fine's appeals in abeyance and again ordered Fine to file a status report "as to whether [he] may proceed as the real-party-in-interest in [CV-536 and CV-139] and whether the automatic stay is in effect." (Show-Cause Order, Sept. 3, 2008). This Court also ordered Fine to "update all aspects of the issues set forth in this Court's previous show cause orders." *Id.* On September 30, 2008, Fine filed his response, directing this Court to the Bankruptcy Court's September 26, 2008 order, in which it ordered the bankruptcy trustee to abstain from administering Fine's marital assets, pending a final order from this Court.

A review of the multiple show-cause orders issued by this Court, as well as Fine's responses, indicates that Fine's cursory and lackadaisical responses are responsible for the lengthy delay of the resolution of this appeal.

amount of \$21,700 to finance part of the purchase price. As of November 14, 1989, the Harps had paid off the mortgage.

The Harps lived at 1220 Royal Avenue until 1978, when the Fines moved into the residence. The Harps continued to pay property taxes on 1220 Royal Avenue as well as the insurance premiums. The Fines paid the Harps \$300.00 per month until March of 2003, when Fine moved out of the residence. The Harps claimed the \$300.00 payments as rental income on their tax returns and continued to hold title to 1220 Royal Avenue. Fine never filed a homestead or mortgage exemption for 1220 Royal Avenue.

On August 23, 2005, Fine filed a motion in Cause No. 917—the dissolution proceeding—to join the Harps as third parties. The trial court granted the motion on September 19, 2005, for the purpose of “resolv[ing] the issue of the ownership of the marital residence.” (Fine’s App. 94).

Fine filed a third-party complaint on October 6, 2005, and an amended third-party complaint on February 14, 2006. Fine asserted, in part, the following:

3. Sometime in 1977, Robert and Delores Harp executed a written contract with Thomas and Karen Fine for the sale of the residence located at 1220 Royal Avenue, whereby the Harps were contract sellers and the Fines were contract buyers.

4. The purchase price of the residence was Seventy Two Thousand Five Hundred Dollars (\$72,500.00) for which Thomas and Karen Fine paid Twelve Thousand Dollars (\$12,000.00) to the Harps as earnest money, and were to pay the Harps Three Hundred Dollars (\$300.00) per month thereafter at an interest rate of nine percent (9%) per annum.

5. Two copies of the subject contract were executed in 1977; one of which was in the possession of the Harps, and the other in the possession of the Fines. Thomas Fine has attempted and failed to retrieve a copy of the

contract from the Harps and Karen Fine, who had possession of the contract after Thomas left the marital residence in March 2003

[6]. The [Harps] claim that no such contract exists and assert that they are the sole owners of [] the real estate located at 1220 Royal Avenue, Evansville, IN.

[7]. [Fine] asserts that [the Harps] have no interest outside that of contract sellers in 1220 Royal Avenue.

(Harps' Cause No. 917 App. 2).³ The Harps filed their answer and counterclaim on June 22, 2006.

During a deposition taken on January 17, 2006, copies of personal checks written on Karen and Thomas Fine's joint checking account were produced. The checks were in the amount of \$300.00 each and made payable to Robert Harp. At some point, Karen Fine had made notations on the memo lines of the checks, reading either "H.R." or "H. Rent." (Fine's App. 71-79). Copies of receipts for the payments made between 1996 and 2002 also were produced.

At some point thereafter, Fine received one of the checks directly from Fifth Third Bank. While the memo notation on the copy produced during the deposition read "H. Rent," the memo notation on the check produced by Fifth Third Bank read, "H.P." (Fine's App.79, 80).

On August 3, 2006, the trial court commenced a three-day hearing on Fine's third-party complaint. Karen Fine testified that she had altered the checks in 2003, making the

³ The Harps filed two appendices, one containing the documents from Cause No. 917 and one containing the documents from Cause No. 5106. We shall refer to them as "Cause No. 917 App." and "Cause No. 5106 App."

changes for her own record-keeping purposes. She further testified that she had recreated the rent receipts for her father because she could not photocopy the original receipts.

On February 1, 2007, the trial court entered its findings of fact and conclusions of law in Cause No. 917. The trial court found in favor of the Harps on Fine's third-party complaint. As to the Harps' counterclaims "relating to abuse of process and slander of title as it related to the property at 1220 Royal Avenue," the trial court entered judgment in favor of Fine. (Fine's App. 115).

Fine filed a notice of appeal on March 5, 2007. The trial court entered its final decree of dissolution on March 20, 2007. Fine filed a notice of appeal as to the decree of dissolution on September 12, 2007.

2. Cause No. 5106

Initially, we recite the relevant preliminary facts from the declaratory judgment action, as provided in *Fine v. Harp*, No. 82A01-0412-CV-538, slip op. at 2-3 (Ind. Ct. App. Dec. 29, 2005).

Fine was married to Karen Harp Fine ("Karen"), the Harps' daughter. On May 9, 1987, the Harps entered into an agreement with Vernon and Fretta Parker to purchase real estate at 1562 South Fairlawn, Evansville, Indiana (the "Property"). The purchase price for the Property was \$72,500. The Harps borrowed \$50,000 from a bank and gave the Parkers a \$22,500 note. Fine and Karen were not parties to the purchase agreement.

At the time the Harps purchased the Property, the only improvement on the Property was a residential structure. The Harps converted the residence into offices, which they leased to a hearing aid sales and service company. The other half of the Property was to be used by Fine and Karen for a used car business, MPG Motors. The Harps constructed a building on the portion of the Property to be used by Fine and Karen. Fine and Karen also made improvements to the Property, such as paving the parking lot and installing a heating and air conditioning system in the building. Fine and

Karen paid \$537.30 each month by writing a check payable to the bank and by giving the check to Robert Harp. Robert would then take the check to the bank and apply it to his payment for the \$50,000 loan. The amount paid by Fine and Karen was substantially below the fair market rental value for the Property. Fine and Karen also paid one-half of the property taxes.

In September 2003, Fine filed a petition for dissolution of marriage, and the Harps sent Fine a letter stating that he was delinquent on rent and property taxes for the Property. As a result, Fine filed a declaratory judgment complaint against the Harps seeking a judgment that he is a co-owner of the Property. The Harps filed an answer, affirmative defenses, and a counterclaim for breach of oral lease and ejectment, slander of title and abuse of process, criminal mischief, and trespass. After a bench trial, the trial court entered findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52(A)

The trial court found, in part, as follows:

51. Four witnesses (Robert G. Harp, Delores C. Harp, Vernon Parker and Karen Fine) have testified that there was no agreement for [Fine] to purchase a portion of the Real Estate, and [Fine] himself admits that he cannot remember having a verbal agreement or any of the terms of such an agreement.
52. [The Harps] are the sole owners of the Real Estate and are entitled to immediate possession. [Fine] should be ordered to vacate and surrender said premises to [the Harps].
53. There is no oral or written contract or promise supporting [Fine's] claim for an ownership interest in the Real Estate.
54. There is not sufficient evidence to support [Fine's] claim of promissory estoppel.
55. There was no promise by [the Harps] to induce [Fine] to reasonably rely upon to his detriment. There was no promise of a definite and substantial nature, and no injustice has resulted to [Fine].
56. [Fine] is a tenant who, as of the time of filing this lawsuit, was in breach of his lease with the Harps.
57. [Fine] filed his claim after the expiration of the statute of limitations.

58. Estoppel does not apply to toll the statute of limitations or to circumvent the statute of frauds in this case because there was no fraud or misconduct by the Harps to cause [Fine] to delay in pursuing his alleged claim or preventing [Fine] from asserting his rights.

No. 82A01-0412-CV-538, slip op. at 10-11. The trial court therefore denied Fine's claim for declaratory relief, finding the Harps to be the "sole and rightful legal owners of the Real Estate commonly known as 1562 S. Fairlawn Avenue in Evansville" No. 82A01-0412-CV-538, slip op. at 15.

In his appeal, Fine asserted that the trial court erred in concluding that the statute of frauds and the statute of limitations barred his claim. On December 29, 2005, this Court affirmed the trial court, holding as follows:

We conclude that the trial court's finding that there was no oral promise supporting Fine's claim for an ownership interest in the Property is supported by the evidence presented at the trial. Because the evidence does not support Fine's assertion that a promise was made to him by the Harps regarding the ownership of the Property, we cannot say that the trial court's determination that promissory estoppel was inapplicable is clearly erroneous. The doctrine of promissory estoppel does not remove Fine's claim from operation of the statute of frauds, and, therefore, the trial court's conclusion that Fine's claim is barred by the statute of frauds is not clearly erroneous.

No. 82A01-0412-CV-538, slip op. at 23. Finding this issue dispositive, this Court did not address Fine's statute of limitations claim.

Fine sought a rehearing from this Court's memorandum decision, which was denied on March 7, 2006. Thereafter, Fine sought transfer to the Indiana Supreme Court on April 6, 2006. The Indiana Supreme Court denied transfer on August 17, 2006, and this Court's opinion was certified that same day.

In the meantime, on May 5, 2006, Fine filed a motion for relief from judgment pursuant to Trial Rule 60(B)(3) in Cause No. 5106—the declaratory judgment action.

Fine asserted the following:

1. On December 7, 2004, this Court entered its Order & Entry of Judgment & Findings of Fact & Conclusion of Law for this cause of action in declaring [the Harps] to be the sole owners of the [Property] upon which it based its Judgment.
2. The testimony of both Robert Harp and Karen Fine were relied heavily upon by this Court in its Findings of Fact upon which it based its Judgment.
3. Evidence has arisen in the case now pending before this court, Cause No. [917], which implicated both Robert Harp and Karen Fine as having destroyed, spoiled, tampered with, and forged vital documents in an attempt to perpetuate a fraud not only on [Fine], but on this Court.
4. Copies of checks . . . from Karen and Thomas Fine’s joint checking account were produced during Thomas Fine’s deposition taken by the Harps on January 17, 2006; the originals of which have been requested on numerous occasions by [Fine] in motions to compel filed with the Court. The memo lines for these checks all read “H.R.,” “H. Rent,” or some variation of same.
5. All of these checks produced were conveniently outside of the date range for which banks are required to maintain records. However, Fifth Third Bank mailed to [Fine] a copy of check no. 8226 which had yet to be destroyed
6. The memo line in the copy of check no. 8226 provided by Fifth Third Bank clearly reads “H.P.”
7. The copy of check no. 8226 entered as an exhibit in [Fine’s] deposition reads “H. Rent” and was held out to be a true and accurate representation of the original.
8. The memo line of check no. 8226 was clearly altered from its original form in an attempt to bolster the Harp’s [sic] and Karen Fine’s assertion that there never existed a contract for the purchase/sale of the Royal Avenue property.

9. [Fine] has retained a handwriting expert, Aida Meyer, who will testify that all of the “R’s,” indicated “rent”, in the memo lines for those checks entered as exhibits in [Fine’s] deposition were altered by adding an additional line to the letter “P,” which would represent “payment”.

10. Further, copies of receipts . . . were entered as exhibits in [Fine’s] deposition which indicated payments of Three Hundred Dollars (\$300.00) for “rent” on the Royal Avenue residence.

11. These receipts are dated 1996 through 2002.

12. Each of these receipts contains a logo in the bottom right-hand corner placed there by the manufacturer, Cardinal Brands, Inc.

13. Robert Goeden is the Director of Marketing and Category Management with Cardinal Brands, and was on the marketing team which designed the logo appearing at the bottom of these receipts.

14. The logo on the bottom of the receipts was not placed into commercial production until some time after the year 2000; as indicated by the Affidavit of Robert Goeden

15. This indicates that the receipts purportedly for payments received by the Harps in 1996 could not have been written until after the year 2000.

16. This newly discovered evidence establishes that the [Harps], along with their daughter, Karen Fine, had in place an unconscionable plan or scheme to improperly influence the Court’s decision.

17. The above mentioned activities by the Harps and Karen Fine prevented [Fine] from fully and fairly presenting his case at trial. The veracity of not only their testimony in [C]ause [N]o. [5106], but the veracity of those exhibits entered at trial in [C]ause [N]o. [5106], being records purportedly kept by Robert Harp or Karen Fine, has been completely discredited by this new evidence of fraud.

(Harps’ Cause No. 5106 App. 32-34).

On June 16, 2006, the trial court found that it lacked jurisdiction to hear Fine’s motion for relief from judgment as Cause No. 5106 was “still pending before the Indiana

Supreme Court” (Harps’ Cause No. 5106 App. 36). The trial court further vacated the hearing on the matter scheduled for June 12, 2006. After the Indiana Supreme Court denied transfer of Cause No. 5106 on August 17, 2006, Fine filed a renewed motion for relief from judgment on August 21, 2006.

On September 28, 2006, the trial court held a hearing on Fine’s motion for relief from judgment. The trial court incorporated into the record “all of the testimony and the exhibits that were presented in [Cause No. 917]” into the record. (Harps’ Cause No. 5106 App. 254). The trial court denied Fine’s motion on February 5, 2007, finding, inter alia, that Fine “has been unable to establish by the evidence that the situation concerning the altering of the checks meets the criteria for relief under the fraud on the court doctrine.” (Fine’s App. 22).

DECISION⁴

1. Motion for Relief From Judgment

Fine asserts that the trial court abused its discretion in denying his motion for relief from judgment. We disagree.

We review a trial court’s denial of a motion for relief from judgment for abuse of discretion. *Case v. Case*, 794 N.E.2d 514, 517 (Ind. Ct. App. 2003). A trial court abuses its discretion when its denial is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.* “On a motion for relief from judgment,

⁴ We note that Fine’s counsel fails to adhere to Indiana Appellate Rule 46(A)(8)(a), which requires that each contention be supported by citations to the “the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.” Appellate Rule 22 provides that “[a]ny factual statement shall be supported by a citation to the page where it appears in an Appendix, and if not contained in an Appendix, to the page it appears in the Transcript or exhibits”

the burden is on the movant to demonstrate that relief is both necessary and just.” *G.B. v. State*, 715 N.E.2d 951, 953 (Ind. Ct. App. 1999).

Fine filed his motion for relief from judgment under Cause No. 5106—the declaratory judgment action, alleging that Robert Harp and Karen Fine “attempt[ed] to perpetuate a fraud not only on [Fine]” but also on the trial court. (Harps’ Cause No. 5106 App. 40). Fine filed his renewed motion for relief from judgment on August 21, 2006.⁵

Trial Rule 60(B)(3) provides, in pertinent part, as follows:

On motion and upon such terms as are just the court may relieve a party . . . from an entry of default, final order, or final judgment . . . for the following reasons:

* * *

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

Under Trial Rule 60(B), a motion filed pursuant to subdivision (B)(3) must be filed “not more than one year after the judgment, order or proceeding was entered or taken”

Clearly, Fine did not file his motion for relief from judgment within one year after the trial court entered its judgment. Thus, his motion was untimely.

Trial Rule 60(B), however, has a savings clause regarding relief from judgment due to fraud. It provides that Trial Rule 60(B) “does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court.” Independent actions are not limited to the one-year filing

⁵ Fine filed his original motion for relief from judgment on May 5, 2006. We, however, shall not address the May 5, 2006 motion as Fine states in his reply brief that “[t]he motion for relief from judgment which was before this court was the motion that was filed subsequent to the Supreme Court denying transfer.” Fine’s Reply Br. at 4 (emphasis added). Nevertheless, even if we were to consider the May 5, 2006 motion, the outcome of our decision would remain the same.

requirement under subdivision (B)(3). *See Stonger v. Sorrell*, 776 N.E.2d 353, 356 (Ind. 2002).

Here, Fine did not file an independent action. Instead, he filed a motion for relief from judgment under Cause No. 5106, which was the cause number for the declaratory judgment action.

Citing *Rocca v. Rocca*, 760 N.E.2d 677 (Ind. Ct. App. 2002), *trans. denied*, the trial court nevertheless construed Fine’s motion as an independent action. In *Rocca*, this court determined that Trial Rule 60(B) grants a trial court “‘inherent equitable jurisdiction’ . . . to grant relief from a judgment obtained by extrinsic fraud or fraud on the court.’” 760 N.E.2d at 680 (quoting *Glover v. Torrence*, 723 N.E.2d 924, 932 (Ind. Ct. App. 2000)).

Rocca, however, does not address whether the party seeking relief from judgment did so pursuant to an “independent action” or what constitutes an independent action under Trial Rule 60(B). Thus, we must determine whether Fine could seek relief from judgment outside of the one-year time frame and the proper procedure for doing so.

When interpreting trial rules, we apply the rules of statutory construction. *Carter-McMahon v. McMahon*, 815 N.E.2d 170, 175 (Ind. Ct. App. 2004). “[O]ur objective when construing the meaning of a rule is to ascertain and give effect to the intent underlying the rule.” *Id.* Trial rules must be construed together and harmoniously if possible. *Id.* “If the language of a rule is clear and unambiguous, it is not subject to judicial interpretation.” *Id.*

Trial Rule 2(A) dictates that “there shall be one [1] form of action to be known as ‘civil action.’” Trial Rule 3 prescribes:

a civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee . . . and where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.

Again, Trial Rule 60(B) provides, in pertinent part, that “[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court.” (Emphasis added). “The term ‘action’ in its usual sense, at least its usual legal sense, means a suit brought in court, a formal complaint within the jurisdiction of the law.” *Pathman Constr. Co. v. Knox County Hosp. Ass’n*, 164 Ind. App. 121, 326 N.E.2d 844, 854 (1975).

Furthermore, Trial Rule 60(B) continues: “Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from judgment shall be by motion as prescribed in these rules or by an independent action.” (Emphasis added). “Or” is “used as a function word to indicate an alternative” <http://www.merriam-webster.com/dictionary/or> (last visited Oct. 6, 2008). Clearly, the language of Trial Rule 60(B) considers independent actions to be separate and distinct from a motion filed under subdivision (B), which is in harmony with Trial Rules 2 and 3.

Thus, while Trial Rule 60(B) preserves the power of the trial courts to entertain independent actions for fraud on the court, it is not the proper avenue for pursuing relief from judgment due to fraud after the time for filing under subdivision (B)(3) has expired.

Rather, a party seeking relief from judgment due to fraud on the court after the one-year limit must file an independent action by way of Trial Rule 3. To allow otherwise would render meaningless the time requirement for filing a motion under Trial Rule 60(B)(3), i.e., one year.

Additionally, although Trial Rule 60(B)(8) allows that a motion for relief from judgment may be filed for “any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4),” and may be done so “within a reasonable time,” it is not a means to evade the time limit set forth for filing a motion under subdivision (B)(3). “Relief under subdivision (8) is not available if the grounds for relief properly belong in another of the enumerated subdivisions.” *Levin v. Levin*, 626 N.E.2d 527, 533 n.2 (Ind. Ct. App. 1993), *aff’d*, 645 N.E.2d 601 (Ind. 1994).

Even if relief were available to Fine under subdivision (8), we would not find his motion to have been filed “within a reasonable time” as Fine did not file it until nearly two years after the judgment and seven months after Karen Harp provided copies of the checks in question. T.R. 60(B). Although Fine did file his original motion for relief from judgment a little over one year from the date of the judgment and only three months after Karen Harp provided copies of the checks, he filed it while the judgment was on appeal and did not follow the procedures for seeking relief from a judgment on appeal. *See Logal v. Cruse*, 267 Ind. 83, 368 N.E.2d 235, 236 (1977) (clarifying the proper procedure “when an appellant seeks to raise a Trial Rule 60(B) challenge to a judgment against which an appeal has been taken”).

Given the language of Trial Rule 60(B), we would find no abuse of discretion in finding Fine's motion for relief from judgment untimely and therefore denying it. Nonetheless, we shall consider Fine's motion for relief from judgment on the merits as the trial court construed his motion as an independent action.⁶ In so doing, we find no abuse of discretion in denying Fine's motion for relief from judgment.

In order to prevail on a claim of fraud on the court, a party "must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense." *Stonger*, 776 N.E.2d at 357. "Fraud on the court has been narrowly applied and is limited to the most egregious of circumstances involving the courts." *Id.*

The party seeking to have a judgment set aside carries the burden of proving fraud on the trial court. *See id.* at 358. "To prove fraud on the court, it is not enough to show a possibility that the trial court was misled." *Id.* "Rather, there must be a showing that the trial court's decision was actually influenced." *Id.*

In this case, Fine asserted that the "newly discovered evidence establishes that the Defendants, Robert and Delores Harp, along with their daughter, Karen Fine, had in place an unconscionable plan or scheme to improperly influence the Court's decision." (Fine's App. 388). Namely, he alleged that the receipts and checks made available during his deposition taken in Cause No. 917—the dissolution proceeding—"completely

⁶ Again, we do not find that Fine's motion was filed as an independent action.

discredited” any evidence presented by the Harps and Karen Harp in Cause No. 5106—the declaratory judgment action. (Fine’s App. 388).

Fine, however, presents no evidence that the trial court relied on the checks or receipts or was in any way influenced by them.⁷ In fact, neither the checks nor the receipts were admitted into evidence in the declaratory judgment action. Furthermore, the checks and the receipts were for transactions related to the Royal Avenue property, which was not the property at issue in the declaratory judgment action. Finally, Fine presents no evidence that either Karen Fine or the Harps engaged in acts that prevented him from fully and fairly presenting his case in the declaratory judgment action.

In ruling on Fine’s Trial Rule 60(B) motion, the trial court found that “[t]he checks at issue[] were not introduced into evidence during the trial of [Cause No. 917].” (Fine’s App. 21). The trial court therefore “never considered them” *Id.* at 23. Thus, there was no purported fraud on the trial court. *See G.H. Skala Constr. Co v. NPW, Inc.*, 704 N.E.2d 1044, 1049 (Ind. Ct. App. 1998) (finding no fraud on the court where the misrepresentations were not made to the trial court), *trans. denied*.

Fine has failed to show that the altering of checks and receipts related to the Royal Avenue property was part of an unconscionable plan or scheme to improperly influence the trial court’s decision in the declaratory judgment action and that such acts prevented Fine from fully and fairly presenting his case or defense in that action. *See Stonger*, 776

⁷ We again note that Fine’s counsel has failed to support his argument to the contrary with citations to his Appendix or the record. Thus, counsel leaves us to comb through a five-volume transcript; three volumes of exhibits; and his two-volume Appendix, which we will not do. *See Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1027 (Ind. Ct. App. 2005) (“When parties fail to provide argument and citations, we find their arguments are waived for appellate review.”), *trans. denied*.

N.E.2d at 357. Accordingly, we find no abuse of discretion in denying Fine’s motion for relief from judgment.

2. Third-Party Complaint

Fine asserts that the trial court erred in determining that the Royal Avenue property is not a marital asset. Specifically, Fine argues the evidence does not support the trial court’s findings and the findings do not support the judgment. We, however, find that we lack jurisdiction over Fine’s appeal of the order in Cause No. 917 as there is no final judgment.

Whether we have subject matter jurisdiction is an issue we should raise sua sponte if the parties do not. As we have previously explained, “dismissal for lack of subject matter jurisdiction takes precedence over the determination of and action upon other substantive and procedural rights of the parties.” Jurisdiction is a question of law that we review de novo.

Cardiology Assoc. of Northwest Indiana, P.C. v. Collins, 804 N.E.2d 151, 153-54 (Ind. Ct. App. 2004) (citations omitted). Whether an order is a final judgment “governs the appellate courts’ subject matter jurisdiction, and unlike most contentions, lack of jurisdiction is not waived by the parties.” *Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003) (citing *Doperalski v. City of Michigan City*, 619 N.E.2d 584, 585 (Ind. Ct. App. 1993), *reh’g denied*). Although the parties or the trial court may treat an order as a final judgment, “[n]either the parties nor the trial court can confer appellate jurisdiction over an order that is not appealable either as a final judgment or under Trial Rule 54(B).” *Georgos*, 790 N.E.2d at 451.

Indiana Trial Rule 54(B) provides:

When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases, a judgment, decision or order as to less than all the claims and parties is not final.

Essentially, “a final judgment ‘disposes of all issues as to all parties thereby ending the particular case.’” *Georgos*, 790 N.E.2d at 451. Thus, a final judgment “leaves nothing for future determination.” *Id.*

Here, the trial court’s ruling on Fine’s third-party complaint did not adjudicate all of the claims, rights, or liabilities of all of the parties in the dissolution action. It clearly did not end the dissolution proceeding or leave nothing for future determination.

For example, the trial court entered its decree of dissolution on March 20, 2007. Fine filed his notice of appeal of the decree on September 12, 2007, approximately six months after Fine filed his notice of appeal of the order on Fine’s third-party complaint. The dissolution decree addressed the division of marital property. Therefore, the resolution of the issue at hand—whether the trial court erred in finding that the Royal Avenue property is not a marital asset—could have a bearing on the trial court’s

dissolution decree as to the division of marital property, and the appeal thereof, particularly if we were to reverse the trial court's judgment. Such is the problem created by Fine's piecemeal litigation.

Furthermore, the trial court made its finding under Trial Rule 54(B). "Trial Rule 54(B) certification of an order that disposes of less than the entire case must contain the magic language of the rule." *Id.* at 452. "[A]n order becomes final and appealable under Rule 54(B) 'only by meeting the requirements of T.R. 54(B). These requirements are that the trial court, in writing, expressly determine that there is no just reason for delay and, in writing, expressly direct entry of judgment.'" *Id.* (quoting *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 385 (Ind. 1998), *cert. denied*, 525 U.S. 1049 (1998)).

Because the trial court's order of February 1, 2007, is not a final appealable judgment, we do not have jurisdiction over Fine's appeal of that order. We therefore dismiss this appeal as to Cause No. 917 and remand to the trial court for any further proceedings.

Affirmed in part, dismissed in part, and remanded in part.

BAKER, C.J., and BRADFORD, J., concur.